Malice/gross negligence

Russell G. Thornton, JD

In health care liability claims, claimants often plead for recovery of exemplary/punitive damages from the defendant health care providers. These allegations often cause anxiety for the defendants, because invariably their professional liability insurance carrier sends them a letter stating that such claims—as well as any damages that may be awarded to compensate the claimant for such claims—are not covered by insurance, thereby bringing to harsh light the fact that their personal assets have been placed at risk. The burden on claimants to prove entitlement to such damages, however, is quite heavy. As such, while requests for exemplary/punitive damages are ubiquitous in health care liability claims, it is quite rare that the underlying facts, unless very egregious, support such allegations, both at trial and on appellate review.

Under current Texas law, a claimant is not entitled to exemplary/punitive damages unless the claimant proves that the underlying injury or event on which the request for exemplary/punitive damages is based results from fraud, malice, or gross negligence (1) or is based on a separate statutory provision that both establishes a cause of action and authorizes the recovery of exemplary/punitive damages (2). When exemplary/punitive damages are sought in health care liability claims, they are most frequently based on allegations of malice and/or gross neglect.

The existence of fraud, malice, and/or gross negligence must be proven by "clear and convincing" evidence (3). "Clear and convincing" evidence is defined as "the measure of the degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established" (4). This standard has been described as falling "between the preponderance standard of civil proceedings and the reasonable doubt standard of criminal proceedings" (5).

Further, exemplary/punitive damages may be awarded only if the jury is unanimous in deciding liability for exemplary/punitive damages and the amount of exemplary/punitive damages to be assessed (6). In addition, there is authority that supports the contention that in a health care liability claim, the elements of "malice" and/or "gross negligence" need to be established by expert testimony (7).

Malice is defined as "a specific intent by the defendant to cause substantial bodily injury or harm to the claimant" (8). This is a pretty straightforward definition. Malice is quite difficult to prove in the context of health care services. Basically, to establish malice, a claimant must show not only that the defendant had some ill will towards her, but that he purposely acted on that ill will to cause her some serious injury.

Gross negligence, as defined, is a much more nebulous and complicated concept. Gross negligence is an act or omission "which (1) when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others" (9). To establish gross negligence, there must be more than evidence of "simple negligence" (10). Gross negligence, however, can be established through circumstantial evidence (11).

To satisfy the "extreme risk" part of the definition, there must be evidence of more than "a remote possibility of injury or even a high probability of minor harm." To establish extreme risk, the evidence must show "the likelihood of serious injury" (11). The "actual awareness" element requires evidence that "the defendant knew about the peril, but its acts or omissions demonstrated that it did not care" (12).

In *Columbia Medical Center of Las Colinas v. Bush,* the Fort Worth Court of Appeals reviewed a matter in which a jury found the hospital liable for exemplary/punitive damages because three of its employees participated in the improper administration of a contraindicated medication to the plaintiff during an emergency department admission. The hospital employees tried to defend their conduct on the basis that the medication at issue was ordered by "doctors that we trusted" (13).

The Court of Appeals found that the "extreme risk" and "actual awareness" elements were satisfied in this situation because, despite the fact that the medication was ordered by a physician, each of these individuals knew from the Advanced Cardiac Life Support guidelines that the medication could have "lethal," "disastrous" consequences when administered to someone like the plaintiff, and they recognized that the standards of care applicable to them required that they exercise independent

From Stinnett Thiebaud & Remington LLP, Dallas, Texas.

Corresponding author: Russell G. Thornton, JD, Stinnett Thiebaud & Remington LLP, 2500 Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202 (e-mail: rthornton@strlaw.net).

judgment and not just "blindly follow a doctor's order that they knew posed an extreme degree of risk to the patient" (13).

In *Columbia Medical Center of Las Colinas v. Hogue,* another emergency department case, the issues involved claims that the patient died from substandard care because the hospital did not have the capability to perform and interpret "stat" echocardiograms and did not have a list of on-call physicians by specialty. Plaintiffs claimed that the failure to offer these services to emergency department patients like the decedent caused his death from severe mitral valve leakage. Specifically, plaintiffs claimed that the patient was not seen soon enough by a specialist. The pulmonologist "consulted" by the emergency room was not "on call" and was seeing other patients at the time; thus, there was a significant delay between the request to see the patient and when the patient was seen. In addition, there was a more than 2-hour delay in obtaining an echocardiogram ordered for "now" by the consultant once he arrived. By the time the mitral valve condition was diagnosed and steps were being taken to properly treat that condition, the patient died from cardiac arrest (14).

On the "stat echo" claim, the evidence established that the hospital knew that "there was a high probability a life-threatening medical emergency requiring 'stat' echocardiogram services would occur." The hospital also admitted that "stat" echocardiograms were an "obvious" and "elementary" part of emergency department services. Despite this knowledge, the hospital did not make arrangements to be able to provide emergency department patients with echocardiogram services on a "stat" basis. Based on this evidence, the Dallas Court of Appeals held that there was sufficient evidence of the "extreme risk" element. The "actual awareness" element of this claim was established based on this knowledge, as well as the known danger to patients from this lack of service and the hospital's conscious decision to not incur the financial costs associated with making these services available to emergency department patients (14).

The evidence also supported the "extreme risk" element for the "on-call list" claim. First, the hospital acknowledged that it was "responsible to ensure there were sufficient staff on duty to care for patients, and it would be a problem if a doctor did not know whom to call if a specialist were needed." In addition, federal guidelines required hospitals to have an on-call list by specialist. This knowledge, combined with the fact that the hospital advertised that its emergency department was "full service" and "open 24 hours a day, 7 days a week" was sufficient to fulfill this element of a gross negligence allegation. "Actual awareness" was supported by the record because the hospital advertised that its emergency room was full service but "knew that it did not have an on-call list of specialists to handle specific types of cases as needed" (14).

HCRA of Texas, Inc. v. Johnston reviewed a jury award of exemplary/punitive damages in a nursing home liability case. The key facts in this matter were plaintiffs' assertion that the "extreme risk" and "actual awareness" elements were supported by evidence that over a 7- to 10-day period the patient developed decubitus ulcers due to failure of the nursing home to properly turn him and that this condition worsened because the nursing home also failed to diagnose and treat these ulcers over this same time frame. The Fort Worth Court of Appeals held that this evidence did not support a jury finding on the "extreme risk" element. Specifically, the court stated, "We do not hold that the failure to recognize and treat decubitus ulcers may never constitute an extreme risk of serious injury. We simply hold that no evidence exists that the approximate ten-day failure to do so in this case constituted an extreme risk of serious injury." Thus, the jury verdict awarding exemplary/punitive damages to plaintiffs on this basis was reversed (15).

In *Clayton v. Wisener,* the elements of "extreme risk" and "actual awareness" were found to not be supported by the evidence. In this matter, the plaintiff alleged that she was entitled to exemplary/punitive damages from a physician with whom she worked in providing billing and collection services. The specific allegations were that the defendant "(1) asked about her sex life with her husband, (2) asked if she 'ran around on [her] husband,' (3) told her to perform various sex acts on him, (4) told her he wanted to touch different parts of her body, and (5) propositioned her for sex." Graphic descriptions of the exact statements at issue are in the opinion and the record. The Tyler Court of Appeals ruled that despite testimony supporting these allegations, there was "no clear and convincing evidence in the record to support a finding that Dr. Clayton had an actual awareness that his conduct exposed Wisener to an extreme risk of substantial harm and proceeded with conscious indifference to her rights, safety, or welfare" (16).

Based on the definition of malice, it is clear that the threshold is high to support a jury finding based on that allegation. Review of rulings on the elements of gross negligence claims indicates a somewhat inconsistent application of the underlying definitions based on the facts available. However, one important thing can be gleaned from review of these cases: for there to be a reasonable chance of a gross negligence finding to be upheld, the claim at issue must be based on some fairly egregious conduct. Even when there is a positive jury finding that seems to be based on some apparently egregious actions, as in *Johnston* and *Clayton*, the appellate courts may second-guess that finding on appeal.

1. *Tex. Civ. Prac. & Rem. Code,* Section 41.003 (a) (Vernon's 2006).
2. *Tex. Civ. Prac. & Rem. Code,* Section 41.003 (c) (Vernon's 2006).
3. *Tex. Civ. Prac. & Rem. Code,* Section 41.003 (b) (Vernon's 2006).
4. *Tex. Civ. Prac. & Rem. Code,* Section 41.001 (2) (Vernon's 2006).
5. *Foley v. Parlier,* 68 S.W.3d 870, 880 (Tex. App.—Fort Worth 2002, no pet.).
6. *Tex. Civ. Prac. & Rem. Code,* Section 41.003 (d) (Vernon's 2006).
7. See *Pack v. Crossroads, Inc.,* 53 S.W.3d 492, 500 (Tex. App.—Fort Worth 2001, pet. denied).
8. *Tex. Civ. Prac. & Rem. Code,* Section 41.001 (7) (Vernon's 2006).
9. *Tex. Civ. Prac. & Rem. Code,* Section 41.001 (11) (Vernon's 2006).
10. *Mobil Oil Corp. v. Ellender,* 968 S.W.2d 917, 922 (Tex. 1998).
11. *Transp. Ins. Co. v. Moriel,* 879 S.W.2d 10, 22–23 (Tex. 1994).
12. See *Wal-Mart Stores, Inc. v. Alexander,* 868 S.W.2d 322, 326 (Tex. 1993).
13. *Columbia Medical Center of Las Colinas v. Bush,* 122 S.W.3d 835 (Tex. App.—Fort Worth 2003, pet. denied).
14. *Columbia Medical Center of Las Colinas, Inc. v. Hogue,* 132 S.W.3d 671 (Tex. App.—Dallas 2004, no pet.).
15. *HCRA of Texas, Inc. v. Johnston,* 178 S.W.3d 861 (Tex. App.—Fort Worth 2005, no pet.).
16. *Clayton v. Wisener,* 190 S.W.3d 685 (Tex. App.—Tyler 2005, no pet.).